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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 862

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Petitioner,*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions of the District Court (Appendices A and C to Petition) are reported at 250 F. Supp. 691 and 253 F. Supp. 538. The opinions of the Court of Appeals (Appendices E and F to Petition) have not yet been officially reported, but are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force," do the modifications in prior crew-consist agreements and rules made by or pursuant to the Award continue to apply until changed in accordance with the Railway Labor Act, or do the prior agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

2. Could a union subject to the Award elect, prior to the expiration thereof, to proceed under the procedures established by the Railway Labor Act rather than under the procedures established by the Award with respect to proposed changes in crew-consist agreements and rules?

3. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) deprive the federal courts of jurisdiction to grant injunctive relief enforcing the mandates of the Railway Labor Act?

4. If Section 8 of the Norris-LaGuardia Act is applicable to injunctions intended to require compliance with the mandates of the Railway Labor Act, did petitioner establish that respondents failed to comply with the said Section 8?

Statement of the Case

Respondents herein are the petitioners in No. 863, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate description of the relevant facts than is contained in the instant petition. Insofar as the Statement of the Case is comprised of a discussion of the legislative history of P.L. 88-108 and other legal arguments, we deal briefly with such matters in the Argument section of this brief. Since the petition in No. 863 concerns the Brotherhood of Railroad

Trainmen (BRT) and the Switchmen's Union of North America (SUNA) as well as the Order of Railway Conductors and Brakemen (ORC&B), we note below certain facts pertinent only to this petitioner.

Unlike the BRT and SUNA, the ORC&B did not enter into any agreements pursuant to Award 282 and was not subject to any special board awards pursuant to Award 282. The parties, therefore, did not list any such agreements or awards in the Stipulation (JA 74-81) [1] which constituted (together with exhibits thereto) the record upon which the case was determined with respect to the ORC&B. Consequently, the issue as to the agreements and rules in effect following the expiration of Award 282 is of only academic interest to this petitioner.

The notices of proposed changes in crew-consist agreements and rules served by the ORC&B during the period of the Award were not served "[p]ursuant to the command of the Board [Arbitration Board No. 282] . . ." as is stated in the petition, at 7. Those notices expressly stated (JA 82) that they were "[p]ursuant to Section 6 of the Railway Labor Act", the parties so stipulated (JA 76), the ORC&B so conceded in the court below (Brief, at 6, 30), and it subsequently admits in the instant petition (p. 9) that the "notices [were] served under Section 6 of the Railway Labor Act." Thus, when the carriers concerned refused to agree to the proposals in those notices, the ORC&B sought to invoke the services of the National Mediation Board rather than refer the dispute to a special board of adjustment as provided in Award 282 (Pet., at 7; JA 78-79; Pet., App. I, at 104a-106a). As petitioner concedes (Pet., at 17), those Section 6 notices provided that the proposals therein were to become effective 30 days

[1] JA references are to the Joint Appendix in Dockets Nos. 20,158 and 20,191 below.

after service of the notices, which was some 9 months prior to the expiration of Award 282 (JA 76, 82).

The Section 6 notices served by petitioner proposed to establish a rule requiring the use of at least one conductor and two brakemen on all train crews in road service (JA 76). Since the use of at least one conductor already was required by existing agreements and rules (which requirement was not affected by Award 282), the only change proposed related to the number of brakemen. The ORC&B did not represent road brakemen on some 44 of the 54 carriers served with its Section 6 notice, and those carriers took the position that the notice was invalid for that reason as well as being premature (JA 74-78, 83-84). The parties stipulated that that issue would not be litigated in this proceeding, but could be raised in some other proceedings, and the issue was not considered by the courts below (JA 81, 173-174).

Argument

1. Petitioner's contention (Pet., at 10-16) that the court below erred in holding that the crew-consist rules established pursuant to Award 282 continue to apply until changed in accordance with the Railway Labor Act is, we believe, completely without foundation. Some of our reasons for that belief are set forth in the petition in No. 863, at 12-27.

For present purposes, however, it does not matter whether the court below erred in that regard or as to whether the issue has sufficient importance to merit review by this Court. This petitioner—the ORC&B—is not affected by the ruling below on that issue as it was not a party to any agreements or special board awards pursuant to Award 282. Thus, no crew-consist rules affecting petitioner were established pursuant to the Award so as to continue to apply under the decision below. Moreover, the

ORC&B will be in a position to present its arguments on the principles involved if the petition in No. 863 is granted, even though the instant petition be denied. The ORC&B is included among the respondents to that petition because one of the issues there presented—whether or not the procedures established by Award 282 continue to apply until changed in accordance with the Railway Labor Act—does affect the ORC&B as well as the other crew-consist unions. In the courts below, the ORC&B opposed the carrier's contention that those procedures continue to apply on the ground that, as argued in the instant petition, the Congress intended the Award to have no effect whatsoever following its expiration.

2. In our view, the purpose and effect of the expiration date in Award 282 was to place a moratorium upon proceedings pursuant to the Railway Labor Act during the two-year period of the Award and to permit the parties, after that period expired, to proceed under the Act with respect to Section 6 notices proposing changes in crew-consist rules. See the petition in No. 863, at 23-27. The ORC&B not only sought to bargain under the Railway Labor Act during the period of the Award with respect to such notices, but sought to make the crew-consist rules proposed therein effective during the period of the Award. In effect, therefore, petitioner contends that the Award could be ignored altogether. Instead of having any disputes over its proposals decided by a special board of adjustment, as the Award provides, the ORC&B would have been in a position to enforce its demands by strikes, even during the period of the Award, if that contention were correct.

We do not believe, therefore, that there is any merit in petitioner's contention that the court below erred in holding that its Section 6 notices were premature (Pet., at

16-17). But once again, it does not make any significant practical difference to petitioner whether that holding was right or wrong. The judgment of the District Court, which was affirmed in this regard by the Court of Appeals, provides that the Section 6 notices served by the ORC&B "were not nullities but were premature and did not become effective under the Railway Labor Act until January 26, 1966—the day after the expiration of the Award of Arbitration Board No. 282" (JA 172). Hence, insofar as any issues involved in this case are concerned, petitioner has been free since January 25, 1966 to proceed with its notices under the Railway Labor Act.[2]

3. The trial court issued a temporary restraining order preventing the unions, including the ORC&B, from striking the carriers over any dispute as to the agreements and rules in effect following expiration of the Award, pending hearing upon a motion for a preliminary injunction (JA 28-30). The parties agreed, however, to submit the case for final decision upon a stipulated record, and the carriers did not further press their prayer for injunctive relief. Hence, the judgment entered by the trial court merely declared the rights of the parties and did not enjoin anyone (JA 167-174).

In view of those developments, the carriers urged in the court below that any issues as to the applicability of the Norris-LaGuardia Act were moot. See *Benitez* v. *Anciani*, 127 F. 2d 121, 125 (1st Cir., 1942); *Southard & Co.* v. *Salinger*, 117 F. 2d 194, 196 (7th Cir., 1941). That court thought, however, that the unions might be able to prove some damages from the temporary restraining order which would be recoverable upon the $10,000 bond posted pursuant to that order, if the order were found to be invalid,

[2] As we have noted (p. 4, *supra*), those notices may be invalid for reasons which have been stipulated out of this case.

and thus it passed upon the Norris-LaGuardia issues (Pet., App. F, at 86a-89a).

The court below was "clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-LaGuardia Act" (Pet., App. F, at 86a).[3] But, that court also held that *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), established a "principle of accommodation" between the two statutes which "means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-LaGuardia Act, and yet be subject to Section 8 of that Act" (Pet., App. F, at 87a). The court concluded that the temporary restraining order was invalid insofar as it applied to the BRT because the carriers had not complied with Section 8 of Norris-LaGuardia with respect to that union, but there was no failure to comply with Section 8 with respect to the ORC&B so that the temporary restraining order was not invalid insofar as it applied to that union (Pet., App. F, at 89a).

This difference in result as between the two unions turned upon the differing conclusions reached by the court below as to the duty of the carriers to bargain upon the Section 6 notices served by the unions during the period of the Award. The court held that the carriers did have a duty to bargain with the BRT upon its notices which proposed changes in crew-consist rules to become effective after expiration of the Award, but did not have such a duty with respect to the notices served by the ORC&B which proposed changes in crew-consist rules to become effective

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[3] In so holding, the court "adhered" to its ruling on a similar issue in "No. 20316" (Pet., App. F., at 86a), which is reported as *Brotherhood of Loc. Fire. & Eng.* v. *Bangor & Aroostook R. Co.*, 380 F. 2d 570, 582-584 (D.C. Cir., 1967), cert. den., No. 353 (O. T., 1967).

during the period of the Award (Pet., App. E, at 47a-58a). Hence, the carriers "failed to comply with [an] obligation imposed by law which is involved in the labor disputes in question" (29 U.S.C. § 108) insofar as the BRT is concerned (if Section 8 of Norris-LaGuardia is applicable, as the court held), but not insofar as the ORC&B is concerned.

The Norris-LaGuardia issues have little immediate importance to any of the parties. As we have noted, the temporary restraining order expired long ago by its own terms, and no further injunctive relief was entered. The ORC&B does not claim in its petition that it incurred any damages as a result of the temporary restraining order which could be recovered upon the bond if that order was invalid, and we doubt if any significant damages could be proven. As the ORC&B states (Pet., at 8), it denied "that any strike was intended" so that the temporary restraining order only required it to refrain from doing what it said it did not intend to do in any event. But at most recoverable damages would be limited to the $10,000 amount of the bond, which amount would have to be shared by both unions.[4]

In our petition in No. 863 (p. 32), we also pointed out that the Norris-LaGuardia issue there presented "has little immediate importance to the parties." We urged, nevertheless, that this Court should review the holding below that Section 8 of Norris-LaGuardia may apply to injunctions requiring compliance with the mandates of the Railway Labor Act, because that holding conflicts in principle with decisions of this Court and of other courts of appeals and is important to the administration of the Norris-LaGuardia and Railway Labor Acts (Pet. in No.

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[4] See, *e.g.*, *Lawrence* v. *St. L.-S.F. Ry.*, 278 U.S. 228, 233 (1929); *International Garment Work. Un.* v. *Donnelly G. Co.*, 147 F. 2d 246, 253 (8th Cir., 1945); *United Motors Service* v. *Tropic-Aire*, 57 F. 2d 479 (8th Cir., 1932).

863, at 27-32). The Norris-LaGuardia rulings sought to be reviewed by the ORC&B, however, do not involve any such conflicts or general importance. The holding that Section 4 of Norris-LaGuardia does not apply to injunctions requiring compliance with the mandates of the Railway Labor Act accords with numerous decisions by this Court, and the holding that the carriers complied with Section 8 of Norris-LaGuardia insofar as the ORC&B is concerned involves only the application of that Section to the facts of this particular case.

Section 4 of Norris-LaGuardia (29 U.S.C. § 104) deprives the federal courts of jurisdiction to enjoin certain specified activities in connection with labor disputes subject to the Act, including "[c]easing or refusing to perform any work or to remain in any relation of employment;" *i.e.*, strikes. But this Court has consistently held "that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957). See *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 563 (1937). Thus, the court on several occasions has upheld the jurisdiction of the federal courts to enjoin strikes in violation of the Railway Labor Act despite the provisions of Norris-LaGuardia. *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963); *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531 (1960); *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30(1967).

Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), relied upon by petitioner (Pet., at 18-19), is not to the contrary. In that case, the "major" dispute procedures of the Railway Labor Act had been exhausted (362

U.S., at 349-351), so that no violation of the Railway Labor Act was involved once it was established—as this Court held—that the Section 6 notices in question were valid and bargainable. Insofar as "major" disputes over proposed changes in "agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. § 156) are concerned, the "parties are required to submit to the successive procedures designed to induce agreement," but "compulsions go only to insure that those procedures are exhausted before resort can be had to self help." *Elgin, J. & E. R. Co.*, v. *Burley*, 325 U.S. 711, 725 (1945). Once those procedures have been exhausted, the parties are free to resort to self help, including strikes, without violating the Railway Labor Act. *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 243-244 (1966); *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 291 (1963).

The lower court decisions cited by petitioner (Pet., at 19) also involved situations in which the procedures of the Railway Labor Act had been exhausted with respect to major disputes, so that the strikes in question did not violate the mandates of that Act.[5] In situations such as that involved here, where the major disputes procedures of the Railway Labor Act have not been exhausted so that a strike violates the Act, the courts have consistently held that Norris-LaGuardia does *not* bar an injunction against such a strike. *Norfolk & P.B. L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45-46 (4th Cir.; 1957); *Pennsylvania Railroad Co.* v. *Transport Wkrs. Union*, 202 F. Supp. 134, 137 (E.D. Pa., 1962); *Western Air Lines* v. *Flight Engineers Internat'l Ass'n.*, 194 F. Supp. 908, 910-911 (S.D. Cal., 1961); *Pennsylvania Railroad Co.* v. *Trans-*

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[5] See 302 F. 2d 540, 543; 292 F. 2d 61; 322 F. 2d 793, 795, 798; 316 F. 2d 556, 563, 564. Footnote 24 in *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 42 (1957), also referred to such a situation, as is shown by the citation of *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50 (1944). See fn. 7, p. 12, *infra*.

port Workers Union, 191 F. Supp. 915, 921 (E.D. Pa., 1960), aff'd, 280 F. 2d 343 (3d Cir., 1960); *Chicago, Rock Island & P. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D. N.Y., 1960), rev'd on other grounds, 292 F. 2d 61 (2d Cir., 1961); *American Airlines, Inc.* v. *Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958).[6] In short, the court below simply applied well-settled law in holding that Section 4 of Norris-LaGuardia did not deprive the District Court of jurisdiction to enjoin a violation of the Railway Labor Act.

For the reasons summarized in the petition in No. 863 (pp. 27-32), we believe that the court below erred in holding that Section 8 of Norris-LaGuardia (29 U.S.C. § 108) is applicable, even though Section 4 is not, to injunctions requiring compliance with the mandates of the Railway Labor Act. But that error favored the ORC&B and it asks only that this Court review the holding that the carriers complied with Section 8 insofar as the ORC&B is concerned. The only error suggested in that regard (Pet., at 18-21) is the ruling that the carriers were not required to bargain during the period of the Award upon the Section 6 notices served by the ORC&B. We have demonstrated (pp. 5-6, *supra*) that that ruling is correct and is not worthy of review by this Court. Petitioner's contention (Pet.,

[6] Many other opinions have stated in *dicta* that Norris-LaGuardia does not bar an injunction against a strike in such circumstances. *E.g., Eastern Air Lines, Inc.* v. *Flight Engineers International Ass'n*, 340 F. 2d 104, 106 (5th Cir., 1965); *Pan American World Air.* v. *Flight Eng. Inter. Assoc.*, 306 F. 2d 840, 846 (2nd Cir., 1962); *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail T.*, 229 F. 2d 926, 930-931 (7th Cir., 1956), aff'd, 353 U.S. 30 (1957). And, the courts have held in the converse situation, where a carrier has not exhausted the major dispute procedures of the Railway Labor Act, that Norris-LaGuardia does not bar an injunction against the carrier. *E.g., Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955).

at 20) that that ruling "is in square conflict with the decision" in *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50 (1944), is obviously inaccurate. That was not a case, such as is involved here, in which the union attempted to nullify P.L. 88-108 and Award 282 by utilizing the procedures of the Railway Labor Act rather than those required by the Award to bring about changes in crew-consist rules.[7]

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[7] In the *Toledo* case, the procedures of the Railway Labor Act had been exhausted with respect to a valid Section 6 notice (see 321 U.S., at 51-52), so that a violation of the Railway Labor Act was not involved. Rather, the injunction was sought under Norris-LaGuardia itself by reason of violence in connection with the strike, and there was no question about the fact that Section 8 of Norris-LaGuardia was applicable. The holding was that the carrier failed to comply with Section 8 when it refused a request that it submit the dispute to arbitration. The cases cited at the top of page 21 of the petition as being to the "same effect" as the *Toledo* case actually involved different issues, but also have no resemblance to the instant case.